No. 95-365 (4)

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PEÑA, SECRETARY OF TRANSPORTATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

WALTER A. SMITH, JR.*
DANIEL B. KOHRMAN
AUDREY J. ANDERSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA
1400 20th Street, N.W.
Washington D.C. 20036
(202) 457-0800

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

Counsel for Petitioner

* Counsel of Record

DREW S. DAYS, III*
Solicitor General
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530
(202) 514-2217

Counsel for Respondent

PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1995
WRIT OF CERTIORARI GRANTED JANUARY 5, 1996

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 94-CV-1608

JAMES GRIFFIN LANE

v.

FEDERICO PENA, SECRETARY OF TRANSPORTATION, ET AL.

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1994		
July 22	1	COMPLAINT filed by plaintiff(s) James Griffin Lane; jury demand (jeb) [Entry date 07/25/94]
July 22	2	MOTION filed by plaintiff(s) JAMES GRIFFIN LANE for preliminary injunction Exhibits 1-17. (jeb) [Entry date 07/25/94]
July 22	--	SUMMONS (5) issued to federal party(s) defendant FEDERICO PENA, defendant THOMAS MATTESON, defendant ALBERT J. HERBERGER, and non-parties: U.S. Attorney and U.S. Attorney General. (jeb) [Entry date 07/25/94]

July 28	--	STATUS HEARING before Judge Charles R. Richey: Reporter: Frank Rangus (jeb)
August 1	3	ORDER by Judge Charles R. Richey: consolidating the hearing on the plaintiff's motion for preliminary injunction with a final determination on the merits; cross motions due 4:00 8/19/94; response to cross motions due 4:00 9/2/94; reply to cross motions due 4:00 9/16/94; directing counsel file joint statement of undisputed material facts in this case due 8/19/49 [sic] at 4:00. (N) (jeb)
August 19	7	MOTION filed by defendant FEDERICO PENA, defendant THOMAS MATTESON, defendant ALBERT J. HERBERGER to dismiss complaint [1.1], or in the alternative for summary judgment Exhibits (5) bulky pleading (1pp) [Entry date 08/22/94]
August 19	8	MOTION filed by plaintiff(s) JAMES GRIFFIN LANE for summary judgment, Exhibits (5) (1pp) [Entry date 08/22/94]
Sept. 2	9	RESPONSE by defendant FEDERICO PENA, defendant THOMAS MATTESON, defendant ALBERT J. HERBERGER in opposition to motion for summary judgment [8-1] by JAMES GRIFFIN LANE, Exhibits (4) (1pp) [Entry date 09/08/94]
Sept. 2	10	RESPONSE by plaintiff(s) JAMES GRIFFIN LANE in opposi-

		tion to motion to dismiss complaint [1-1] [7-1] by ALBERT J. HERBERGER, THOMAS MATTESON, FEDERICO PENA, motion for summary judgment [7-2] by ALBERT J. HERBERGER, THOMAS MATTESON, FEDERICO PENA, Exhibits: (8). (1pp) [Entry date 09/08/94]
Sept. 7	12	SUPPLEMENTAL/DECLARATION of James Griffin Lane (1pp) [Entry date 09/12/94]
Sept. 16	13	NOTICE OF FILING by defendant FEDERICO PENA, defendant THOMAS MATTESON, defendant ALBERT J. HERBERGER of the original signed declaration of Dr. William E. Evans and correction of an erroneously filed exhibit; attachments (2). (tth) [Entry date 09/19/94]
Sept. 16	14	REPLY by plaintiff(s) JAMES GRIFFIN LANE to response to motion for summary judgment [8-1] by JAMES GRIFFIN LANE; exhibits (4). (tth) [Entry date 09/19/94]
Sept. 16	15	REPLY by defendant FEDERICO PENA, defendant THOMAS MATTESON, defendant ALBERT J. HERBERGER to response to motion to dismiss complaint [7-1], and motion for summary judgment [7-2]; exhibits (7). (tth) [Entry date 09/19/94]
Oct. 26	21	MEMORANDUM OPINION by Judge Charles R. Richey (N) (jeb)

Oct. 26	22	ORDER by Judge Charles R. Richey: granting motion for summary judgment [8-1] by JAMES GRIFFIN LANE, except as to the amount of damages; denying motion to dismiss complaint [1-1] [7-1] by ALBERT J. HERBERGER, THOMAS MATTESON, FEDERICO PENA; entering judgment in favor of the plaintiff on the issue of liability; directing defendants to reinstate plaintiff Lane as a student [at] the U.S. Merchant Marine Academy forthwith, and [take] steps necessary to ensure that plaintiff Lane resumes his maritime training at the Academy as soon as practicable; setting status call for 11/16/94 at 11:00 a.m. (N) (jeb)
Dec. 21	--	STATUS HEARING before Judge Charles R. Richey: hearing held. Reporter: Frank Rangus (dbw) [Entry date 12/22/94]
Dec. 21	27	JOINT STIPULATION filed [by] plaintiff and defendants regarding Defendant's Liability for damages. (N) (1pp) [Entry date 12/23/94]
Dec. 22	26	ORDER by Judge Charles R. Richey: response to motion to supplement the record due 4:00 1/13/95; vacating the Court's order of 10/26/94 only to the extent that it awards damages to the plaintiff; entering judgment in favor of the defendant solely on the issue of the plaintiff's entitlement to damages; Attachment (1) (N) (dbw)
Dec. 23	30	NOTICE OF APPEAL by defendant FEDERICO PENA, defendant

		THOMAS MATTESON, defendant ALBERT J. HERBERGER from order [22-1], entered on: 10/26/94. No fee paid U.S. Government (ted) [Entry date 12/27/94]
Dec. 27	--	TRANSMITTED PRELIMINARY RECORD on appeal [30-1] by ALBERT J. HERBERGER, THOMAS MATTESON, FEDERICO PENA to U.S. Court of Appeals (ted)
1995		
Jan. 4	--	USCA #94-5405 assigned for appeal [30-1] by ALBERT J. HERBERGER, THOMAS MATTESON, FEDERICO PENA (ted) [Entry date 01/06/95]
Jan. 6	31	NOTICE OF APPEAL by plaintiff JAMES GRIFFIN LANE from order response to motion to supplement the record due 4:00 1/13/95; [26-1], order vacating the Court's order of 10/26/94 only to the extent that it awards damages to the plaintiff [26-2], order entering judgment in favor of the defendant solely on the issue of the plaintiff's entitlement to damages [26-3], order [26-4], entered on: 12/22/94, Filing Fee $5.00 and Docketing Fee $100.00 paid, Copies to Daniel B. Kohrman, Arthur B. Spitzer, Patricia M. Russotto. (1pp) [Entry date 01/09/95]

Jan. 9	--	TRANSMITTED PRELIMINARY RECORD on appeal [31-1] by JAMES GRIFFIN LANE to U.S. Court of Appeals (1pp)
Jan. 9	32	AMENDED NOTICE OF APPEAL by plaintiff JAMES GRIFFIN LANE from order [26-1] [26-2], [26-3], [26-4], entered on: 12/22/94, Filing and Docketing Fees Paid 1/6/95, Copies to: Walter A. Smith, Jr. and Patricia M. Russotto. (1pp) [Entry date 01/10/95]
Jan. 30	--	USCA #95-5006 assigned for appeal [32-1] by JAMES GRIFFIN LANE, appeal [31-1] by JAMES GRIFFIN LANE (1pp) [Entry date 01/31/95]
Mar. 1	39	CERTIFIED COPY of order filed in USCA dated 2/27/95, on appeal [30-1], dismissing appeal. USCA #94-5405 (cjp) [Entry date 04/24/95]
June 26	40	LETTER to Judge Charles R. Richey from Daniel B. Kohrman requesting Court to defer consideration of request for costs and attorney's fees until resolution of all proceedings which may occur in this case before the U.S. Supreme Court. "Let this be filed" Richey, J. (dbw) [Entry date 06/27/95]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

C.A. No. 94-5405

JAMES GRIFFIN LANE

v.

FEDERICO PENA, SECRETARY OF TRANSPORTATION, ET AL.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1994	
Dec. 30	CIVIL-US case docketed. Notice of Appeal filed by Appellant Federico F. Pena, Appellant Thomas Matteson, Appellant Albert J. Herberger. [93799-1] (lrn)
1995	
Jan. 24	CLERK'S ORDER filed to consolidate cases on cross-appeals [97867-1]. Directing to file [97867-2]: docketing statement due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; certificate of counsel due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; statement of issues due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; lower court decision due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; any procedural

	motions due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; transcript status notice due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; deferred appendix notice due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; appearance form due 2/23/95 for Frank W. Hunger in 94-5405, for Walter A. Smith in 95-5006; any dispositive motions due 3/10/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006. [94-5405, 95-5006] (lvs)
Feb. 14	Motion filed (5 copies) by Appellants Federico F. Pena, et al. in 94-5405, (certificate of service 2/14/95) to dismiss case voluntarily [106325-1]. (lvs)
Feb. 27	CLERK'S ORDER filed granting the motion to dismiss case voluntarily filed by Federico F. Pena, Thomas Matteson, Albert J. Herberger [106325-1] The Clerk is directed to issue the mandate. (lvs)
Feb. 27	MANDATE ISSUED to Clerk, District Court [106358-1]. (lvs)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

C.A. No. 95-5006

JAMES GRIFFIN LANE

v.

FEDERICO PENA, SECRETARY OF TRANSPORTATION, ET AL.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1995	
Jan. 24	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant James Griffin Lane. [97858-1] (lvs)
Jan. 24	CLERK'S ORDER filed to consolidate cases on cross-appeals [97867-1]. Directing to file [97867-2]: docketing statement due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; certificate of counsel due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; statement of issues due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; lower court decision due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; any procedural motions due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; transcript status notice due 2/23/95 for Federico F. Pena in 94-5405, for James

Griffin Lane in 95-5006; deferred appendix notice due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; appearance form due 2/23/95 for Frank W. Hunger in 94-5405, for Walter A. Smith in 95-5006; any dispositive motions due 3/10/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006. [94-5405, 95-5006] (lvs)

Mar. 6 — MOTION filed (5 copies) by Appellant James Griffin Lane (certificate of service dated 3/6/95) for initial hearing in banc [109416-1], or alternatively for summary affirmance [109416-2]. Response due on 3/16/95. (jth)

Mar. 9 — MOTION filed (5 copies) by Appellees Federico F. Pena, et al., (certificate of service dated 3/9/95) for summary affirmance [109417-1]. Response due on 3/20/95. (jth)

June 2 — PER CURIAM ORDER, In Banc, filed denying motion hearing in banc [109416-1] filed by James Griffin Lane. Before Judges Edwards, Wald, Silberman, Buckley, Willliams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel. Circuit Judge Tatel did not participate in this matter. (lvs)

June 5 — PER CURIAM ORDER filed granting the motion for summary affirmance filed by Federico F. Pena, Thomas Matteson, Albert J. Herberger [109417-1]. The Clerk is directed to withhold issuance of the mandate pending disposition of any timely petition for rehearing. Before Judges Silberman, Sentelle, Henderson. (lvs)

Aug. 3 — MANDATE ISSUED to Clerk, District Court [139923-1]. (edb)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES GRIFFIN LANE,	)	
Plaintiff,	)	
v.	)	Civil Action
FEDERICO PENA, et al.	)	No. 94-CV-1608 (CRR)
Defendants.	)	
	)	

ORDER

On July 28, 1994, counsel for the parties in the above-captioned case appeared before the Court for a status call pursuant to Rule 16 of the Federal Rules of Civil Procedure. At that time, counsel for both parties indicated that they would have no objection to combining a hearing on the Plaintiff's Motion for a Preliminary Injunction with a final determination of the merits in this case pursuant to Rule 65 of the Federal Rules of Civil Procedure. Counsel then informed the Court that there would be no disputes as to material facts and therefore suggested that this matter could be resolved upon the filing of cross-motions for summary judgment. Counsel then proposed a schedule which the Court adopted for the resolution of this case.

Accordingly, it is, by the Court, this 29th day of July, 1994,

ORDERED that pursuant to Rule 65, and with the consent of the parties, the Court shall consolidate a hearing on the Plaintiff's Motion for a Preliminary Injunction with a final determination on the merits of this case; and it is

FURTHER ORDERED that counsel shall be, and hereby are, directed to submit a joint statement of undisputed material facts in this case on or before 4:00 p.m. on August 19, 1994; and it is

FURTHER ORDERED that the parties shall file cross-motions for summary judgment on or before 4:00 p.m. on August 19, 1994; and it is

FURTHER ORDERED that oppositions thereto shall be filed on or before 4:00 p.m. on September 2, 1994; and it is

FURTHER ORDERED that counsel may file replies, if any, on or before 4:00 p.m. on September 16, 1994.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES GRIFFIN LANE,	)	
Plaintiff,	)	
v.	)	Civil Action
FEDERICO PENA, et al.	)	No. 94-CV-1608 (CRR)
Defendants.	)	
	)	

STIPULATED STATEMENT OF UNDISPUTED MATERIAL FACTS

The following facts are undisputed by the parties to the case. Owing to their differing legal theories, the parties disagree as to which of the facts are material, but they agree that none of the facts herein -- and therefore none of the facts herein that this Court ultimately finds material -- are disputed.

1. Plaintiff applied for an appointment to the U.S. Merchant Marine Academy ("USMMA" or the "Academy") in 1990. As a condition of his appointment, plaintiff was required to undergo a physical examination to determine if he met the physical qualifications for appointment to the USMMA.

2. Plaintiff's physical examination was administered by the Department of Defense Medical Examination Review Board ("DoDMERB") on November 29, 1990.

3. On November 27, 1990, plaintiff submitted a medical history form to DoDMERB. It asked, inter alia, whether plaintiff ever had, or at that time had, "blood, protein, or sugar in urine." Plaintiff responded "no."

4. During plaintiff's November 1990 examination by DoDMERB, a urinalysis test was administered and the results were "negative" for sugar in the urine.

5. On June 4, 1991, DoDMERB stamped on plaintiff's medical evaluation form that he was "medically qualified" and "recommended for service academies and ROTC programs."

6. Plaintiff entered the Academy in July 1991.

7. On February 1, 1991, plaintiff consulted a private family physician. He reported excessive thirst and hunger. A test ordered by the physician showed plaintiff had an elevated blood sugar level on February 1. The physician directed plaintiff to limit his intake of calories and to take an oral hypoglycemic medication to reduce his blood sugar level. Over a period of seven weeks, the physician directed plaintiff to gradually phase out his medication and the limits on his diet. Over this period, plaintiff's blood sugar test results fluctuated between the normal range and the higher than normal range. On March 21, 1991, the day of plaintiff's last visit to the physician, his blood sugar was within the normal range.

8. In September or October of 1991, plaintiff had the flu, complained of excessive thirst and hunger, and began to lose weight.

9. On November 29, 1991, plaintiff consulted a private physician, who took blood and urine samples. Tests on the samples, including a "glycohemoglobin" test, indicated high blood sugar. The physician noted she "suspect[ed]" diabetes mellitus and prescribed oral hypoglycemic medication.

10. In December 1991, plaintiff consulted Dr. Didace Kabatsi, a private endocrinologist, who took blood and urine samples. Based on the results of tests performed on the samples between December 23, 1991 and January 15, 1992, including "glycohemoglobin" and "anti-islet cell antibodies" tests, Dr. Kabatsi diagnosed plaintiff as having diabetes mellitus.

11. On February 11, 1992, plaintiff visited Dr. Daniel Kalash, Chief Medical Officer at the Academy. Dr. Kalash recorded in his notes under "Subjective" that plaintiff advised him that plaintiff had what Dr. Kalash characterized as an "intermittent history during [the] past several months of

glycosuria [sugar in the urine] & [elevated] blood sugar." Dr. Kalash also recorded in the same section of his notes that plaintiff advised him that plaintiff had been "[t]reated by private physician [and] oral hypoglycemics." Dr. Kalash further recorded in the same section of his notes that plaintiff advised him that plaintiff's "blood sugar [levels had returned to] normal" and that medications ("meds.") had been "stopped." Dr. Kalash further recorded in the same section of his notes: "endocrinologist - glycohemoglobin & anti-islet cell test elevated." Dr. Kalash further recorded in the same section of his notes that plaintiff reported he was monitoring his "blood sugar in [his] barracks" and that "all findings [were] normal."

12. On February 11, 1992, Dr. Kalash recorded in his notes regarding his visit with plaintiff: "Assess: Early Diabetes type I."

13. On February 11, 1992, Dr. Kalash recorded in his notes regarding his visit with plaintiff: "Capt. Bauer notified & communicated problem to BuMed." At that time, Bauer was the Head of the Department of Naval Science at the Academy.

14. On February 11, 1992, Dr. Kalash instructed plaintiff to "continue observation [of his] blood sugars" and "to report abnormalities & any symptoms." Dr. Kalash indicated that he would repeat the lab workup on plaintiff at the end of his third class (sophomore) year.

15. Plaintiff's medical records at the Academy contain a page entitled "Problem List," which ordinarily is placed on the top of an individual's medical file (at the bottom of the page it reads: "Place sheet top left side one"). The page provides space for ten numbered entries, and has columns labeled "Problem," "Onset," and "Resolved." The only entry for plaintiff is handwritten and reads: (under "Problem") "Diabetes Mellitus?" and (under "Onset") "1991."

16. In March 1992, plaintiff consulted Dr. Jay Skyler, an endocrinologist at the University of Miami, and President of

the American Diabetes Association. Dr. Skyler confirmed plaintiff had diabetes, recommended insulin therapy, and referred plaintiff to Dr. S. Mark Tanen, an endocrinologist in Northern Virginia.

17. Plaintiff achieved a 3.4 grade point average during his first year at the Academy, rowed crew, and consistently scored in the "outstanding" range on the physical readiness exams administered to students at the Academy.

18. While at the Academy, plaintiff participated in various sea-going activities. These included several instances where plaintiff spent the day working aboard a ship. Plaintiff also volunteered and was accepted for a 4-5 day journey up the East Coast in a tugboat, during which storm conditions caused the tugboat to undergo 40-degree rolls. Plaintiff's medical records contain no indication that plaintiff had any medical problems associated with these sea-going activities.

19. In early July 1992, shortly before commencing his second year at the Academy, plaintiff began seeing Dr. Tanen. Dr. Tanen recommended insulin therapy. Plaintiff began taking insulin in July 1992 to help control his diabetes.

20. In a letter dated July 23, 1992, plaintiff's father, J.W. Lane, Jr., notified the Superintendent of the Academy that plaintiff had begun taking insulin in order to control his diabetes.

21. Following Mr. Lane's July 23, 1992 letter, plaintiff first heard from the Academy regarding his diabetes when he was informed that a Physical Examination Review Board ("PERB") hearing had been scheduled to discuss his medical condition.

22. Plaintiff was informed of the PERB hearing on September 4, 1992 (the Friday of Labor Day weekend); the hearing was set for Tuesday, September 8.

23. Plaintiff's PERB hearing was convened on September 8, 1992, as scheduled. According to a report to the Superintendent regarding the hearing prepared by Cap-

tain James D. Ormiston, USMS, the PERB consisted of Ormiston, "Captain William McMullen and Lieutenant Commander David Mund." The Board, "exclusive of LCDR Mund, met with [midshipman] Lane on September 8." At the hearing, "[a]lso participating as non-voting members of the Board were Commander Russell Bauer, US [Navy], Head, [USMMA] Department of Naval Science and Commander William E. Evans, US [Coast Guard]." Plaintiff was unaccompanied at the hearing.

24. The purpose of the PERB hearing was to determine plaintiff's "medical suitability for continuance" at the Academy. This purpose was to be accomplished by confirming that plaintiff had insulin-dependent diabetes mellitus, as indicated in the July 23, 1992 letter from plaintiff's father. The PERB, in evaluating plaintiff's "medical suitability," did not evaluate the particular circumstances of plaintiff's case other than to verify his status as a diabetic.

25. On September 16, 1992, the PERB advised the Superintendent that plaintiff had insulin-dependent diabetes. The PERB advised the Superintendent that under U.S. Navy commissioning standards, insulin-dependent diabetes was "a disqualifying condition for military service" and, accordingly, that plaintiff "would not be commissionable in the Navy/Merchant Marine Reserve Program."

26. On September 16, 1992, the PERB also advised the Superintendent that plaintiff's diabetes might not render him ineligible for a Coast Guard merchant marine license. The PERB advised the Superintendent that Coast Guard licensing "requirements do not seem to be as rigid as the Navy requirements but a waiver is required when an applicant is insulin-dependent and may not be automatic, it would depend on the specifics of the condition."

27. On September 21, 1992, the Superintendent advised plaintiff that he would be separated from the Academy effective December 18, 1992. The Superintendent stated: "Adult-onset (Type I) diabetes is a disqualifying condition for military service. You are not eligible for appointment as

Midshipman, MMR/USNR nor for commissioning as a Naval Reserve Officer." The Superintendent also advised plaintiff that he would be permitted to continue to take classes at the Academy through December 18, 1992, and thus complete the first half of his sophomore year (i.e., the classroom portion, but not the shipboard training portion) and "have an opportunity . . . to arrange for admission to another college to complete your education."

28. In early October 1992, plaintiff's father wrote to Captain Warren G. LeBack, then-Administrator of the U.S. Maritime Administration ("MARAD"), challenging the Superintendent's decision.

29. In November 1992, plaintiff achieved an "outstanding" rating on the physical readiness exam administered by the Academy.

30. In December 1992, Dr. Tanen, the diabetes specialist who had been treating plaintiff regularly since July 1992, concluded that, in his opinion, plaintiff's diabetes was under "extremely good control." Dr. Tanen noted that plaintiff had not experienced any incapacitating episodes due to his condition.

31. Exhibit 11 to Plaintiff's Motion for Preliminary Injunction is a true and accurate copy of a letter dated January 15, 1993, from MARAD Administrator LeBack to plaintiff responding to plaintiff's request for review of the September 21, 1992 decision of the Superintendent to separate plaintiff from the Academy.

32. Between January 15, 1993 and April 15, 1994, plaintiff took steps to obtain the assurances specified in the January 15, 1993 letter.

33. On April 15, 1994, MARAD Administrator A.J. Herberger issued a letter to plaintiff stating, inter alia, that plaintiff could not meet physical qualifications standards applicable to midshipmen at the USMMA because "insulin dependent diabetes disqualifies an individual from receiving a commission in any component of the reserves of the armed forces of the United States."

34. Plaintiff never has refused to apply for such a commission, would apply for one at the appropriate time, and would accept one if offered.

35. The Department of the Navy consistently has applied the same physical qualifications standards with respect to diabetes mellitus. Diabetes mellitus -- whether insulin-dependent or otherwise -- is a disqualifying condition for commissioning in all active duty and reserve units of all of the armed forces.

36. The United States Coast Guard grants merchant marine licenses -- including licenses permitting their holders to serve as deck officers at sea -- to persons with diabetes mellitus, which may include some individuals with insulin-dependent diabetes, and some individuals with non-insulin-dependent diabetes. An individual with diabetes applying for a Coast Guard merchant marine license must obtain a waiver of Coast Guard physical qualifications standards with respect to diabetes. Such waivers may be obtained for individuals, including merchant marine officers, who are able to show to the satisfaction of the Coast Guard that their diabetes is under control and that they are otherwise physically qualified for a merchant marine license.

37. In recent years, students have attended and graduated from the Academy despite having developed physical disabilities -- including loss of a limb, loss of an eye, brain damage and color blindness -- while they were students.

38. Students with insulin-dependent diabetes have enrolled in and recently graduated from at least one state maritime academy, the Maine Maritime Academy.

39. As of December 1993, more than 50 persons with diabetes currently are sailing on an active merchant marine license. At least some of these individuals are insulin-dependent.

Respectfully submitted,

/s/ Daniel B. Kohrman
Walter A. Smith, Jr. #238949
Daniel B. Kohrman #394064
Timothy J. Carlson #439167
Mitchell E. Zamoff #439383
HOGAN & HARTSON, L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

Counsel for Plaintiff
James Griffin Lane

Of Counsel:

Arthur B. Spitzer
AMERICAN CIVIL
LIBERTIES UNION
OF THE NATIONAL
CAPITAL AREA
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

/s/ Patricia M. Russotto
Brian G. Kennedy #228726
Patricia M. Russotto PA Bar
#53557
UNITED STATES
DEPARTMENT OF
JUSTICE
Civil Division, Federal
Programs Branch
P.O. Box 883
Washington, D.C. 20044
(202) 514-4470

Counsel for Defendants
Federico Pena, et al.

Dated: August 19, 1994

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 12, 1994 Decided December 16, 1994

No. 93-5080

JAMES DORSEY,

APPELLANT

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(88cv01898)

Ross Lipman argued the cause for appellant. With him on the briefs were *Mark H. Duesenberg* and *Ella L. Roberts*.

Deborah Ruth Kant, Attorney, Department of Justice, argued the cause for appellees. With her on the brief were *Frank W. Hunger*, Assistant Attorney General, *Eric H. Holder, Jr.*, United States Attorney, and *Barbara C. Biddle*, Attorney, Department of Justice.

Before: EDWARDS, *Chief Judge*, SILBERMAN and RANDOLPH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: The issue in this appeal from the judgment of the district court, dismissing James Dorsey's suit against the Department of Labor, its Secretary, the Office

of Job Corps, and its Director, is whether there is a private right of action for monetary damages against the federal government for violating § 504 of the Rehabilitation Act of 1973, as amended in 1978, 29 U.S.C. § 794. The Ninth Circuit, in *Doe v. Attorney General*, 941 F.2d 780 (9th Cir. 1990), decided this issue against the government. We reach the opposite conclusion on the ground that the government has not waived its sovereign immunity from such suits.

Dorsey alleged that he was handicapped and that, in violation of § 504, the defendants had unlawfully discriminated against him on the basis of his handicap during his participation in the Job Corps. Administered by the Department of Labor, the Job Corps provides training and education for individuals between the ages of 14 and 22 who are "economically disadvantaged" and who were living in "an environment so characterized by cultural deprivation, a disruptive homelife, or other disorienting conditions as to substantially impair prospects for successful participation in other programs providing needed training, education or assistance." 29 U.S.C. § 1693(2) & (3). According to Dorsey, the "vast majority of the Job Corps facilities around the country are residential. In these facilities, Job Corps participants live in a dormitory environment and are under the 24-hour supervision of Job Corps personnel."

Dorsey joined the Job Corps at the residential center in Dayton, Ohio, in August 1987. After enrolling, he submitted to a mandatory medical examination in which he tested positive for HIV antibodies. For this reason and pursuant to its policy at the time, the Job Corps expelled Dorsey from the program in September 1987 and a year later Dorsey brought this suit challenging the Job Corps' action.

In January 1989, while the suit was pending, the Job Corps notified Dorsey that it had revised its policy by making the exclusion of HIV-positive applicants discretionary rather than mandatory and that Dorsey could re-apply to one of its residential centers. On the recommendation of a Job Corps representative, Dorsey applied to the residential facility in Morganfield, Kentucky, and travelled there in May 1989.

Once again Dorsey tested HIV-positive. The Job Corps nevertheless permitted him to join the Kentucky facility, where he enrolled in culinary arts courses. In his amended complaint, Dorsey alleges that after his HIV test results became widely known at the facility, Job Corps staff members and enrollees ridiculed and harassed him. Dorsey requested and received a transfer to the Dayton, Ohio, facility where he had first enrolled. According to Dorsey, a teacher at the Dayton facility disclosed his HIV-positive status and fellow students thereafter harassed him.

In a ruling Dorsey does not contest, the district court dismissed his complaint as moot insofar as it sought declaratory and injunctive relief. As to Dorsey's claim for damages for emotional distress, the district court, relying partly on *Doe v. District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992), ruled that the Rehabilitation Act permitted recovery from the federal government. On the federal defendants' motion, the court reconsidered its ruling and held that § 504 of the Act had not waived the government's immunity from damages. Dorsey appeals from the court's judgment dismissing the compensatory damages portion of his complaint.

The Rehabilitation Act of 1973 deals with discrimination against individuals on the basis of their "handicaps," as the original version of the Act put it, or their "disabilities," as a 1992 amendment to the Act rephrased it. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394, *amended by* the Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 102(p)(32), 106 Stat. 4360 (codified at 29 U.S.C. § 794(a) (Supp. IV 1992)). Section 504, as amended in 1978, bars private federal aid recipients and "Executive agenc[ies]" from discriminating on the basis of a person's handicap and requires the agencies to promulgate regulations needed to carry out the provision. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 119, 92 Stat. 2982. When this action commenced in July 1988, § 504 read in relevant part:

> No otherwise qualified individual with handicaps ... shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency* . . . .

29 U.S.C. § 794(a) (1988). (The italicized words were added in a 1978 amendment to the Act.)

The district court ruled that Dorsey's HIV-positive status rendered him handicapped within the Act's meaning and we shall assume, *arguendo,* this to be so. *See Harris v. Thigpen,* 941 F.2d 1495, 1524 (11th Cir. 1991); *Severino v. North Fort Myers Fire Control Dist.,* 935 F.2d 1179, 1182-83 n.4 (11th Cir. 1991); *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1,* 909 F.2d 820, 825 (5th Cir. 1990). We shall also assume that Dorsey is "an otherwise qualified individual" under § 504 and that the actions he complains about constitute forbidden "discrimination" for which the Job Corps is responsible.

Whether Dorsey may recover damages from the federal government for the discrimination is another matter. The pertinent remedy provision of the Act, § 505(a)(2), states:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

29 U.S.C. § 794a(a)(2). Title VI of the Civil Rights Act prohibits federal grantees or aid recipients from discriminating on the basis of race. 42 U.S.C. § 2000d. Given § 505(a)(2), Dorsey must establish not only the general proposition that claimants may recover monetary relief in private Title VI actions, but also the more specific point that they may do so against Executive agencies despite sovereign immunity.

Dorsey's difficulties begin with the fact that Title VI does not explicitly provide a private right of action for compensatory damages. It preserves whatever general right to judicial review other laws provide or, if none is provided, it allows persons aggrieved to seek judicial review of government funding and grant decisions pursuant to the Administrative Procedure Act. 42 U.S.C. § 2000d-2. If a private right of action for damages under Title VI is to exist, therefore, it must be judicially inferred, or as is commonly stated, implied. On that score the decisional law is not entirely settled. The Supreme Court, in *Consolidated Railroad Corp. v. Darrone,* 465 U.S. 624 (1984), suggested that the issue was open: "[w]ithout determining the extent to which money damages are available under § 504, we think it clear that § 504 authorizes a plaintiff who alleges intentional discrimination to bring an equitable action for backpay." 465 U.S. at 630. *See also* the separate opinions in *Guardians Ass'n v. Civil Service Commission,* 463 U.S. 582 (1983). Since then the Court has treated the question whether a private cause of action should be inferred as an issue of statutory construction and has cautioned that, if a statute provides one sort of remedy, "courts must be especially reluctant to provide additional remedies." *Karahalios v. National Fed'n of Fed. Employees, Local 1263,* 489 U.S. 527, 533 (1989). On the other side of the scale is not only the Ninth Circuit opinion already mentioned, sustaining such an implied right of action (*Doe v. Attorney General,* 941 F.2d at 787), but also the earlier Supreme Court decision in *Cannon v. University of Chicago,* 441 U.S. 677 (1979), which held that Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, is enforceable through an implied right of action because Title IX was derived from Title VI, Congress understood private remedies to be available under Title VI, and Congress therefore intended similar remedies to be available under Title IX. *Cannon,* 441 U.S. at 694-703. Citing *Cannon,* we stated that "private suits provide an appropriate and effective mechanism for judicial consideration of compliance with Title VI." *Adams v. Bell,* 711 F.2d 161, 168 n.35 (D.C. Cir. 1983) (in banc), *cert. denied,* 465 U.S. 1021 (1984). While our discussion in *Adams,* like the Supreme Court's decision in *Consolidated Railroad Corp. v. Darrone,* concerned only equitable relief, this may not be determinative in view of

Franklin v. Gwinnett County Public Schools, 112 S Ct. 1028 (1992). *Franklin* held that once the federal courts have inferred a private cause of action from a statute that did not expressly provide one, the "courts have the power to award any appropriate relief," including not only equitable relief but also monetary damages, unless it appears that Congress intended otherwise. 112 S. Ct. at 1035.

We see no need, however, to resolve the issue. Even if there is an implied right of action for damages under Title VI, and thus under § 504, it cannot exist as against the federal government. The federal government's waiver of sovereign immunity must be "unequivocally expressed" and the statutory provision containing the expression must "establish unambiguously that the waiver extends to monetary claims." *United States v. Nordic Village, Inc.* 112 S. Ct. 1011, 1014, 1015 (1992). Because a § 504 private right of action for damages -- against anyone -- must be judicially implied from a statute silent on the subject, Dorsey is unable to point to any explicit language in the Rehabilitation Act (or in Title VI) waiving the government's sovereign immunity. He therefore cannot prevail. While private rights of action may be implied, waivers of sovereign immunity may not. The Supreme Court has said exactly that, and on more than one occasion: "A waiver of sovereign immunity 'cannot be implied. . . .' " *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 95 (1990), quoting *United States v. Mitchell,* 445 U.S. 535, 538 (1980), which quoted *United States v. King,* 395 U.S. 1, 4 (1969).

Dorsey argues that "[b]ecause monetary damages are available against private parties under title VI and section 505(a)(2), . . . they are equally available against the federal government. . . . Congress intended that *all* remedies available under title VI also be available to aggrieved persons seeking redress under section 505(a)(2)." Brief of Appellant at 11-12. The Ninth Circuit in *Doe v. Attorney General,* 941 F.2d at 790, 792, took much the same position. That damages may be recovered against private parties does not, however, lead to the conclusion that damages may also be

recovered against the government. When it comes to monetary relief, sovereign immunity puts the federal government on a different footing than private parties. To contend, as Dorsey does, that Congress "intended" to make all remedies available for § 504 violations is simply another way of arguing, quite incorrectly, that a court may find a waiver of the government's sovereign immunity despite the absence of any unequivocal statutory expression to that effect. The Ninth Circuit recognized the statutory void and tried to fill it with some legislative history from the 1978 amendment to § 504 bringing Executive agencies within its coverage. But the court found nothing in the committee reports and the five statements it quoted from the floor debates are -- at the very best -- ambiguous. 941 F.2d at 791-92. The three representatives and two senators, rather than expressing themselves clearly on the subject, uttered not a word about relinquishing the government's immunity from damages. In any event, we believe the Ninth Circuit would have decided the case differently if it had had the benefit of the Supreme Court's later decision in *Nordic Village.* The Court there held "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there" -- and it does not in Dorsey's case -- "it cannot be supplied" by legislative history. 112 S. Ct. at 1016.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES GRIFFIN LANE,	)	
Plaintiff,	)	
v.	)	Civil Action
FEDERICO PENA et al.,	)	No. 94-1608
Defendants.	)	
	)	

DEFENDANTS' NOTICE OF APPEAL

Notice is hereby given that defendants Federico Pena, Secretary of Transportation; Thomas Matteson, Superintendent of the United States Merchant Marine Academy ("USMMA"); and A.J. Herberger, Administrator of the Maritime Administration, hereby appeal, pursuant to 28 U.S.C. § 1292(a)(1), to the United States Court of Appeals for the District of Columbia Circuit, from the Order entered October 26, 1994, denying defendants' motion for summary judgment, granting plaintiff's motion for summary judgment, entering judgment in favor of plaintiff on the issue of liability, and directing defendants to reinstate plaintiff at the USMMA and "take all steps necessary to ensure that Plaintiff Lane

resumes his maritime training at the Academy as soon as practicable."

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General
ERIC H. HOLDER, JR.
United States Attorney

/s/ Patricia M. Russotto
BRIAN G. KENNEDY
PATRICIA M. RUSSOTTO

Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Tel: (202) 514-4470
Attorneys for Defendants

(Certificate of Service omitted in printing)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES GRIFFIN LANE,	)	
Appellee,	)	
v.	)	
FEDERICO F. PENA, et al.,	)	No. 94-5405
Appellants.	)	
	)	

ORDER

Upon consideration of Appellant's motion to dismiss appeal pursuant to Federal Rule of Appellate Procedure 42(b), it is

ORDERED that the aforesaid motion is granted and the above captioned appeal is hereby dismissed.

The Clerk is directed to transmit to the Clerk of the District Court a certified copy of this order in lieu of a formal mandate.

FOR THE COURT:

BY: /s/ Elizabeth V. Scott
Elizabeth V. Scott, Deputy Clerk

Order 93-11 (April 1992)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES GRIFFIN LANE,	)	
Plaintiff-Appellant,	)	
v.	)	
FEDERICO PENA, et al.,	)	No. 95-5006
Defendants-Appellees.)		
	)	

MOTION FOR SUMMARY AFFIRMANCE

Pursuant to the Court's local rule 27(g), the defendants, the Secretary of Transportation, et al., hereby move this Court to summarily affirm the district court's judgment in the above-referenced appeal. The reasons for this motion are as follows:

1. The parties agree that the only issue in this appeal is whether plaintiff may recover money damages under section 504 of the Rehabilitation Act for alleged disability discrimination in federal program. 29 U.S.C. 794(a). The district court held that this Court's decision issued on December 16, 1994, Dorsey v. United States Department of Labor, No. 93-5080 (D.C. Cir.), holding that there is no waiver of sovereign immunity for damages under the Rehabilitation Act, 29 U.S.C. 794(a), controls this case and precludes an award of damages. See Attached District Court Order dated December 22, 1994. Plaintiff in his stipulation before the district court and in his motion for an extension of time to file for initial hearing *en banc* or in the alternative summary affirmance does not dispute that the Dorsey opinion governs this case and bars the award for damages. For these reasons, summary affirmance is warranted.

2. Moreover, initial hearing *en banc* is not appropriate in this case. As the Court in Dorsey ruled, the issue of the availability of damages under the Rehabilitation Act for alleged

disability discrimination in government programs involves a straightforward application of principles of sovereign immunity as recently re-articulated by the Supreme Court in United States v. Nordic Village, 112 S.Ct. 1011, 1014-15 (1992). Since Nordic holds that there must be an unequivocally expressed waiver in the text of the statute itself and that it cannot be supplied by legislative history, Dorsey's holding that the text of sections 504 and 505 of the Rehabilitation Act contains no such waiver is unassailable.

CONCLUSION

For the foregoing reasons, the motion for summary affirmance should be granted.

Respectfully submitted,

/s/ Barbara C. Biddle/DRK
BARBARA C. BIDDLE
(202) 514-2541

/s/ Deborah Ruth Kant
DEBORAH RUTH KANT
(202) 514-3518
Attorneys, Appellate Staff
Civil Division, Room 3127
Department of Justice
Washington, D.C. 20530

(Certificate of service omitted in printing)